STATE OF MICHIGAN

COURT OF APPEALS

CITY OF FLINT,

Plaintiff-Appellee,

v

OK INDUSTRIES, INC.,

Defendant/Cross-Defendant-Appellant,

and

JOSEPH GIACALONE and DEANNE GIACALONE,

Defendants-Appellants,

and

INDYMAC BANK,

Defendant,

and

SUN MORALES,

Defendant/Cross-Plaintiff-Third-Party Plaintiff,

and

DEPARTMENT OF TREASURY and NORTH AMERICAN PROFILES, INC.,

Third-Party Defendants.

UNPUBLISHED
April 10, 2007

No. 271624
Genesee Circuit Court
LC No. 04-078903-CH

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Defendants OK Industries, Inc., Joseph Giacalone, and DeAnne Giacalone (collectively "defendants") appeal as of right an order granting plaintiff summary disposition on its breach of contract claim. We affirm.

Plaintiff and defendant OK Industries, Inc. (defendant OK) entered into a loan agreement in which plaintiff agreed to loan defendant OK $877,600 for economic redevelopment within the city. Designed "to increase economic activity" in Flint and to "increase the employment of City residents," funding for the loan was provided to plaintiff by the U.S. Department of Housing and Urban Development (HUD) under its section 108 program, 42 USC 5308. Defendants Joseph and DeAnne Giacalone personally guaranteed the loan, and secured that guaranty by four mortgages in favor of plaintiff. Defendant OK subsequently defaulted in repayment and plaintiff instituted this breach of contract and foreclosure action.

Defendants first argue that the trial court erroneously excluded extrinsic evidence of the parties' intent that time was "of the essence" in executing the loan agreement. We disagree. We review de novo whether the parol evidence rule was properly applied to a contract term. *In re Kramek Estate*, 268 Mich App 565, 573; 710 NW2d 753 (2005); *Glenwood Shopping Center Ltd Partnership v K mart Corp*, 136 Mich App 90, 99; 356 NW2d 281 (1984).

The parol evidence rule bars the admission of "evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract," where that contract is "clear and unambiguous." *Kramek, supra* at 573-574 (internal quotation marks and citations omitted). There are, however,

> exceptions to its application. First, it is a prerequisite to application of the parol evidence rule that there be a finding that the parties intended the written instrument to be a complete expression of their agreement with regard to the matters covered. For this reason, "[e]xtrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question of whether the written instrument is such an 'integrated' agreement." [*Hamade v Sunco, Inc* (*R&M*), 271 Mich App 145, 167-168; 721 NW2d 233 (2006) (citations omitted).]

Fraud in the inducement is a defense to contract formation. See *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). It operates as one exception to permit the admission of extrinsic evidence despite the parol evidence rule. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 502-503; 579 NW2d 411 (1998). Fraud in the inducement "'addresses a situation where the claim is that one party was tricked into contracting,'" that is "'based on pre-contractual conduct.'" *Huron Tool & Engineering Co v Precision Consulting Services*, 209 Mich App 365, 371; 532 NW2d 541 (1995) (citation omitted). It "occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are

relied upon." *Samuel D Begola Services, supra* at 639. "Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party." *Id.* at 636.

Defendants correctly observe that extrinsic evidence of the parties' intent was admissible for a limited purpose—to determine whether the contract was integrated. Because they raised fraud in the inducement as a defense, the circuit court was obligated to consider the evidence they proffered. *Hamade, supra* at 167-168; *UAW-GM, supra* at 502-503. Its failure to do so, however, was harmless error. See *Farm Credit Services of Michigan's Heartland v Weldon*, 232 Mich App 662, 668-671; 591 NW2d 438 (1998).

"It is well settled that 'a person . . . who has been defrauded, must act promptly; and, if he would repudiate the contract, he must do nothing in affirmance of it after ascertaining the facts.'" *LeRoy Constr Co v McCann*, 356 Mich 305, 309; 96 NW2d 757 (1959), quoting *Merrill v Wilson*, 66 Mich 232, 243; 33 NW 716 (1887); see also *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 628; 692 NW2d 388 (2004). Defendants argue that they were fraudulently induced to execute the loan agreement by plaintiff's officials' repeated representations that the HUD funding was forthcoming, that despite funding delays these various reassurances led them to await funding and incur additional debt, and then eventually execute the loan agreement itself.

However, rather than establish fraud in the inducement, this evidence tends to demonstrate defendants' affirmance of the contract following the alleged fraud. *LeRoy Constr Co, supra* at 309; *Ziomek, supra* at 628. The evidence shows that when they executed the loan agreement, defendants were aware of the delays attendant to the HUD loan processing and that prior representations that funding was imminent were inaccurate. Defendants were, however, fully cognizant that although they had urged that time was "of the essence," approximately two years had elapsed since they first sought the loan. Nevertheless, they executed the loan agreement and did not pursue an independent remedy for any alleged fraud. See *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004). This was an affirmation of the agreement after they had ascertained the pertinent fact of plaintiff's delay. *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 294-295; 642 NW2d 700 (2001). Fraud in the inducement requires some misrepresentation or chicanery that prompts contract execution. *Samuel D Begola Services, supra* at 639. When they executed the loan agreement, defendants could not have been under the illusion that they would receive funding prior to that date. The alleged misrepresentations thus could not have prompted defendants' execution of the contract.

Defendants also argue that the trial court erred in denying their motion to set aside the underlying judgment that was based on so-called "newly discovered" evidence that plaintiffs' loan application procedures were in "disarray." Defendants argue that this evidence demonstrates that plaintiff's officials' had the authority to approve the loan and thus could bind plaintiff. We disagree.

MCR 2.612(C)(1)(b) authorizes a trial court to set aside a judgment or order based on "newly discovered evidence." "[A] motion to set aside a prior judgment is discretionary, and will not be reversed absent an abuse of discretion." *Johnson v White*, 261 Mich App 332, 345; 682 NW2d 505 (2004). An abuse of discretion occurs where the result is not a reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

> "It is fundamental that those dealing with public officials must take notice of the powers of the officials. Persons dealing with a municipal corporation through one of its officers must at their peril take notice of the authority of the particular officer to bind the corporation. If the officer's act is beyond the limits of his or her authority, the municipality is not bound." [*Booker v Detroit*, 251 Mich App 167, 177; 650 NW2d 680 (2002), rev'd in part on other grounds 469 Mich 892 (2003), quoting *Johnson v Menominee*, 173 Mich App 690, 693-694; 434 NW2d 211 (1988) (citations omitted).]

The Flint City Charter vests the legislative power of the city in a city council. Flint City Charter, § 3-101. It directs that any action taken by the city must be done pursuant to an ordinance or resolution of the council. Flint City Charter, § 3-307. It also creates various arms of municipal government within the city's executive branch. See Flint City Charter, §§ 4-101, 201, 203, 303, 401, 501, 601. Among these, it establishes the position of a Chief Legal Officer (CLO) for the city. See Flint City Charter, § 4-601. Under the charter, all contracts involving the city must be "prepared by" or "submitted . . . for approval" to the CLO. Flint City Charter, § 4-602.

The rules of statutory interpretation apply to the interpretation of municipal charters and ordinances. *Ferguson v Lincoln Park*, 264 Mich App 93, 95; 694 NW2d 61 (2004). The primary goal of such interpretation is to implement the enactors' intent. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). Unambiguous language is enforced as written, *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003), and only ambiguous language is subject to judicial construction, *Sun Valley Food Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

The representations allegedly made by plaintiff's officials cannot serve to bind plaintiff. *Booker, supra* at 174-175, 178; *Johnson, supra* at 693-695. Procedures for approval of a city loan are plainly governed in part by the Flint Charter. See *G C Timmis, supra* at 420. Under it, no action to finance a city loan can be taken without a city council resolution authorizing the loan. Flint City Charter, § 3-307. Indeed, it is for this reason that the Flint City Council approval was sought and ultimately acquired for the loan in this dispute. Under the charter, following council approval and prior to its execution, the proposed loan contract must be examined and approved by the Flint CLO. Flint City Charter, § 4-602. But neither the city council nor the CLO allegedly made representations to defendants other than the resolution passed with respect to the loan. The individuals allegedly making false representations to defendants had no authority to bind plaintiff to a city loan. *Booker, supra* at 174-175, 178; *Johnson, supra* at 693-695.

We also reject defendants' argument that they should have been granted summary disposition because plaintiff first breached the agreement. Summary disposition rulings are reviewed de novo, *McClements v Ford Motor Co*, 473 Mich 373, 380; 702 NW2d 166 (2005), as are issues of contract interpretation, *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

"[O]ne who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform," where the first breach is

substantial. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994); see also *Baith v Knapp-Stiles, Inc*, 380 Mich 119, 126; 156 NW2d 575 (1968). A "substantial breach" is one that "has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party." *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964) (citations omitted).

We disagree with the argument that plaintiff's alleged failure to timely disburse the loan proceeds on the date the agreement was executed is evidence that plaintiff was the first in breach and, therefore, cannot maintain suit to enforce the contract. While a prior breach may operate as a defense against enforcement of a contract, this "rule only applies when the initial breach is substantial." *Michaels, supra* at 650. The "essential operative element" of the parties' contract was plainly to fund the revitalization of a bankrupt corporation to rejuvenate an economically depressed area. It is undisputed that $801,933.51 of the $877,600 loan was dispersed to defendants, with the remaining monies held back as a result of defendants' default on the loan. Plaintiff's failure to tender the remaining funding cannot be said to have altered the "essential operative elements of the contract," and therefore it neither rendered defendants' further performance "ineffective or impossible" nor did it cause "a complete failure of consideration." *McCarty, supra* at 574. Indeed, defendants accepted the loan proceeds at each distribution, presumably with the intention of performing their duties under the agreement.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Christopher M. Murray